

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of The Public Advocates Office
Investigation Pertaining To Southern California
Gas Company's Accounting Practices, Use Of
Ratepayer Monies To Fund Activities Related
To Anti-Decarbonization And Gas Throughput
Policies, And Related Matters

Not In A Proceeding

**PUBLIC ADVOCATES OFFICE COMMENTS ON
DRAFT RESOLUTIONALJ-391 DENYING
SOUTHERN CALIFORNIA GAS COMPANY'S DECEMBER 2, 2019
MOTION FOR RECONSIDERATION/APEAL OF THE NOVEMBER 1, 2019
ADMINISTRATIVE LAW JUDGE'S RULING AND ADDRESSING
OTHER RELATED MOTIONS**

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I. INTRODUCTION

Pursuant to Rule 14.5 of the California Public Utilities Commission’s (Commission) Rules of Practice and Procedure (Rule), the Public Advocates Office at the California Public Utilities Commission (Cal Advocates) provides these comments on Draft Resolution ALJ-391, denying Southern California Gas Company’s (SoCalGas) December 2, 2019 Motion for Reconsideration/Appeal of the November 1, 2019 Administrative Law Judge’s Ruling (Appeal) and addressing other related motions.

SoCalGas’ Appeal argues that the utility has no obligation to provide to Cal Advocates its contracts and other materials related to its creation and funding of the astroturf lobbying organization¹ – Californians for Balanced Energy Solutions or “C4BES” – on three bases: (1) Cal Advocates has no statutory authority to such information; (2) provision of the information violates the utility’s First Amendment rights of association; and (3) discovery outside of a formal Commission proceeding denies it procedural due process.

Draft Resolution ALJ-391 properly rejects all of these SoCalGas claims. However, the Draft Resolution does not go far enough. Among other things, the Draft Resolution establishes troubling precedent by: (1) declining to issue sanctions for SoCalGas’ discovery abuses that have occurred since the submission of its Appeal by deferring those issues to be addressed in an unidentified forum at a later, unidentified date and (2) ignoring the fact that SoCalGas has unlawfully granted itself a stay from certain discovery pending formal Commission action on its Appeal.

As described in Section II.A below, there is no reason for the Commission to defer sanctions against the utility. The issue of sanctions for SoCalGas’ refusal to comply with a validly issued Commission subpoena and to provide Cal Advocates the confidential versions of the declarations supporting its Appeal have been fully briefed in response to Cal Advocates’ June 23, 2020 and July 9, 2020 motions for sanctions.² There is nothing further to “investigat[e]” by

¹ “Astroturfing” is the practice of masking the sponsors of a message or organization to make it appear as though it originates from and is supported by grassroots participants.

² All of the briefs on both issues, including exhibits, are available on the Cal Advocates’ website at <https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4444> under the headings “6-23-20 Cal Advocates Motion for Contempt & Fines for Subpoena Violation” and “7-9-20 Cal Advocates Motion to Compel Confid Declarations & Fines.”

another “appropriate” Commission “enforcement division.”³ If SoCalGas disagrees with the Commission’s imposition of sanctions in the final resolution, it may appeal that determination through rehearing.

In addition, by deferring sanctions against the utility, the Draft Resolution threatens to render Administrative Law Judge (ALJ) rulings meaningless by providing a troubling road map to Commission-regulated utilities on how to undermine Commission discovery efforts going forward. Specifically, the Draft Resolution establishes that a utility can “appeal” to the Commission any ALJ ruling it contests, and withhold discovery without consequence unless and until the Commission acts – as SoCalGas has done here. Vague threats of potential future sanctions, such as those in the Draft Resolution, are verifiably meaningless to aggressive utilities that view even actual fines as a mere cost of doing business.⁴ The Commission should not encourage such tactics because they undermine the Commission’s authority.

Consistent with these observations, and the recommendations provided below, Draft Resolution ALJ-391 should be supplemented to reflect that:

- (1) Sanctions shall be imposed on SoCalGas consistent with the recommendations set forth in the Cal Advocates’ June 23, 2020 and July 9, 2020 motions;
- (2) No stay of its discovery obligations has been granted to SoCalGas regarding the instant investigation;⁵
- (3) SoCalGas was required to comply with both the September 10, 2019 and November 1, 2019 ALJ rulings on discovery issues while awaiting further rulings on its Appeal;
- (4) SoCalGas’ refusal to comply with ALJ discovery rulings by asserting the same arguments as a basis to withhold discovery between November 1, 2019 and today constitutes contempt of this Commission;

³ Draft Resolution, p. 27.

⁴ See the June 25, 2020 Reporter’s Transcript of Proceedings in the Aliso Canyon civil litigation before the Los Angeles Superior Court, pp. 15, line 21 – 17, line 10, available on Cal Advocates’ website at <https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4446> under “Additional Items of Interest.” Among other things, Plaintiffs’ Counsel explains: “So what do they have to lose? They just don't give us the evidence, the critical evidence in this case. They're not incentivized because they have nothing to lose. If you lose 500,000, a million, 2 million ...in a multi-billion-dollar exposure case, you've won. You've abused the civil discovery system. The residents of this County have not got the justice that this civil justice system is supposed to provide, and that's clear.

⁵ Indeed, the ALJ Ruling of April 6, 2020 expressly denied any stay.

- (5) SoCalGas' privilege claims related to its System Applications Products (SAP) system have no basis and should be rejected;
- (6) Information previously withheld from public review based on SoCalGas' First Amendment claims shall be made publicly available;
- (7) SoCalGas' other confidentiality claims regarding discovery provided to Cal Advocates remain to be determined; and
- (8) If the Commission declines to issue sanctions here, an order to show cause why SoCalGas should not be sanctioned for its discovery abuses will issue no later than the first quarter of 2021.

Each of these issues is addressed more fully below.

II. DISCUSSION

A. **The Draft Resolution Should Impose Sanctions on SoCalGas, or at A Minimum, Reflect That an Order To Show Cause Will Issue No Later Than The First Quarter Of 2021**

The Draft Resolution properly recognizes that SoCalGas has violated fundamental requirements of the “regulatory framework” and interfered with the Commission’s oversight of the utility:

A significant element of the regulatory framework for utilities in California, such as SoCalGas, is the utility’s obligation to provide the Commission and its staff, such as Cal Advocates, with requested information pertaining to regulatory oversight.

and

If a utility, such as SoCalGas, does not comply with the requests for information, such as DR No. CalAdvocates-SC-SCG-2019-05, from the Commission or its staff, including Cal Advocates, or more formal injunctions from the Commission, such as the May 5, 2020 subpoena, it is not unreasonable for the utility to expect to be subject to sanctions up to and including monetary penalties.⁶

Notwithstanding this strong language, the Draft Resolution then errs by deferring to an unspecified date and forum the question of whether SoCalGas will be sanctioned for the discovery abuses that it has engaged in. Specifically, the Draft Resolution declines to address Cal Advocates’ motions for sanctions based on the utility’s fully-briefed refusal to comply with a

⁶ Draft Resolution, Findings 27 and 28, p. 32.

validly issued Commission subpoena and its fully-briefed refusal to provide Cal Advocates the confidential declarations included in its Appeal but intentionally withheld from Cal Advocates.⁷

To be clear, there are no more facts or law to be adduced regarding these two issues. Both Cal Advocates and SoCalGas have had ample opportunity to present their arguments, authorities, and facts to the Commission.⁸ There is no reason the Draft Resolution cannot resolve those motions by issuing sanctions against the utility for its clear violations of law.⁹ This is precisely what the Los Angeles Superior Court has done in the Aliso Canyon civil litigation in response to SoCalGas' discovery abuses,¹⁰ and what the Commission should do here.

Instead of taking necessary action to address SoCalGas' disregard for the Commission's authority, so as to encourage SoCalGas' future compliance with state law and Commission requirements, the Draft Resolution creates unnecessary uncertainty regarding Cal Advocates' requests for sanctions by failing to identify how or when such sanctions will be considered. For example, the Draft Resolution states that "[t]his resolution, and more specifically, the underlying process, is not the proper means for the Commission to consider such fines and contempt."¹¹ However, it does not explain *why* the underlying process is not the proper means for the Commission to consider fines for SoCalGas' contempt, or what process *would* be proper. Instead, it explains that sanctions will be "referred to an appropriate enforcement division within the Commission" for "further investigation":

Any further investigation of SoCalGas' conduct will be referred to an appropriate enforcement division within the Commission. In its referral, Cal Advocates may include instances where it found SoCalGas improperly responded or failed to timely provide information in response to Cal Advocates' discovery requests and should be penalized.

The appropriate enforcement division then will be tasked with investigating the alleged violations and recommending fines and penalties, should the Director of that division deem it appropriate.¹²

This approach is unworkable for several reasons. First, as any Commission practitioner will recognize, the "referral" process described in the Draft Resolution is without precedent at the Commission, and raises a host of questions left unresolved by the Draft Resolution. For

⁷ Draft Resolution, pp. 2 & 26-27.

⁸ All of the briefs on both issues, including exhibits, are available on the Cal Advocates' website at <https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4444> under the headings "6-23-20 Cal Advocates Motion for Contempt & Fines for Subpoena Violation" and "7-9-20 Cal Advocates Motion to Compel Confid Declarations & Fines."

⁹ To the extent SoCalGas objects, it may seek rehearing of the final resolution issued by the Commission. No more process is due.

¹⁰ The Los Angeles Superior Court proceedings are described in detail in Section II.C.2 below.

¹¹ Draft Resolution, p. 26.

¹² Draft Resolution, p. 27.

example: What procedures should Cal Advocates use to “refer” the matter and who should the matter be referred to? Second, what is the “appropriate enforcement division within the Commission” that the Draft Resolution would task with addressing discovery disputes and potential sanctions? And why is it insufficient for the ALJ Division acting through a Commission resolution to address such issues? Discovery disputes are a fundamental legal issue. They frequently require the rights of the parties to be balanced and guided by a substantial body of law. What division, other than the ALJ Division, is designed to decide such legal issues? Indeed, there is certainly well-established Commission precedent for ALJs to sanction utilities that violate the Commission ethics rules, and the Draft Resolution fails to explain why that process is not appropriate here.¹³ Further, by proposing that another, unidentified division undertake an investigation, the Draft Resolution overlooks the fact that Cal Advocates has already undertaken an “investigation” pursuant to its statutory authority.¹⁴ The underlying

¹³ See two examples of sanctions for violations of Rule 1.1, including one for contempt, at D.15-08-032 and D.20-08-037.

¹⁴ See, e.g., California Public Utilities Code § 309.5. See also, October 29, 2020 letter from U.S. Senator Dianne Feinstein and U.S. Representative Nanette Barragan to Scott Drury, Chief Executive Officer of SoCalGas, identifying specific findings from the Cal Advocates’ investigation:

... [a]ccording to an ongoing investigation by the California Public Utilities Commission’s Public Advocates Office, SoCalGas has engaged in a lobbying campaign to undermine the state’s clean energy goals. According to documents related to the investigation, SoCalGas has:

1. Formed a group named Californians for Balanced Energy Solutions using ratepayer money to advocate for increased natural gas use without clearly communicating its relationship with SoCalGas.
2. Lobbied against the zero-emission vehicle mandate for drayage trucks and other vehicles in the San Pedro Bay Ports Clean Air Action Plan of 2017.
3. Lobbied against increased efficiency standards for home furnaces.
4. Failed to comply with the Public Advocates Office’s discovery requests regarding additional documents related to the investigation.

See also September 10, 2020 letter from State Senator Henry Stern to Commission President Marybel Batjer (and copied to all Commissioners), requesting the Commission to facilitate Cal Advocates’ ability to pursue its investigation into SoCalGas’ astroturf activities:

My understanding is the PUC’s Public Advocates Office has been investigating this issue for some time now, but has been unsuccessful in getting SoCalGas to respond to requests for documents and information.

As such, I am asking the PUC to use the full weight and force of its office to order SoCalGas to provide all the documents requested by the Public Advocates Office as soon as possible so the Public

(continued on next page)

discovery dispute results from SoCalGas' refusal, despite a valid subpoena and ALJ rulings, to cooperate with that investigation. Further, the Draft Resolution's implicit assumption that another Commission division will get more cooperation from the utility flies in the face of the well-established principle that Cal Advocates has the same discovery rights as any other part of the Commission. The experiences documented by Cal Advocates in this investigation, by Safety and Enforcement Division in the Aliso Canyon investigation (I.19-06-016), and by the Los Angeles County Superior Court in the Aliso Canyon civil litigation, all demonstrate that SoCalGas will withhold discovery from the Commission and other parties conducting an investigation. By purporting to defer the issue of sanctions to yet another investigation, one which SoCalGas has even more reason to undermine, the Draft Resolution facilitates SoCalGas' pattern of delay, denial, and deferral.

The Commission has clear statutory authority to sanction the utilities it regulates,¹⁵ and it has pursued this authority through Commissioner and ALJ-initiated orders to show cause, OIIs, division citation programs, and other mechanisms. Consequently, it is inconceivable that the Commission cannot identify in this Draft Resolution – which has been pending for nearly a year – the specific process for sanctioning SoCalGas for its evident violations of Commission rules and state law.

Absent ordering sanctions here, the Draft Resolution should, at a minimum, identify the specific process for considering sanctions against SoCalGas, and identify the date when such proceedings will begin. In addition, the Draft Resolution should be supplemented to include the following Findings, which are well-established in the law and the record of these proceedings, and need not, and should not, be “investigated” by some other Commission division:

- (1) SoCalGas' refusal to comply with fundamental regulatory requirements is a violation of state law, Commission requirements, and its franchise to operate in California.
- (2) Consistent with the Commission's determinations in D.15-08-032, while SoCalGas may timely assert valid legal arguments, it may not

Advocates Office can conclude its investigation into whether SoCalGas has acted inappropriately in this matter.

Both letters are available on the Cal Advocates' website at <https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4446> under “Additional Items of Interest.”

¹⁵ See, e.g., California Public Utilities Code §§ 2107, 2108, 2113 & 2114.

unilaterally or indefinitely withhold information pending resolution of those arguments, nor assert frivolous claims that frustrate Commission oversight.

- (3) SoCalGas' motion to quash the May 5, 2020 Commission Subpoena was served eleven days after performance on the Subpoena was due and it was therefore out of time and should be rejected on that basis alone.
- (4) SoCalGas' motion to quash the May 5, 2020 Commission Subpoena was based on frivolous claims already rejected in the ALJ Rulings of September 10, 2019 and November 2, 2019.
- (5) SoCalGas did not have the right to impose a "custom software solution" to limit Cal Advocates' review of its accounts and records pending resolution of its claims.
- (6) SoCalGas did not have the right to require Cal Advocates to execute a non-disclosure agreement before providing access to its SAP system.¹⁶
- (7) Contrary to SoCalGas claims,¹⁷ prior practices of Commission staff in reviewing SoCalGas' accounts and records do not excuse SoCalGas's disobedience of the Commission Subpoena.
- (8) Contrary to SoCalGas claims,¹⁸ because the Commission has a statutory right and obligation to review SoCalGas' accounts and records, it would be redundant for the Commission to have to establish a compelling need for access to those accounts and records.
- (9) SoCalGas' refusal to comply with the May 5, 2020 Commission Subpoena had no basis in law or fact.
- (10) SoCalGas' refusal to comply with the May 5, 2020 Commission Subpoena is a violation of a Commission order.
- (11) SoCalGas' refusal to comply with the May 5, 2020 Commission Subpoena is a violation of the November 1, 2019 ALJ Ruling denying its First Amendment claims.
- (12) SoCalGas' refusal to comply with the May 5, 2020 Commission Subpoena is a violation of California Public Utilities Code § 314.

¹⁶ See Exhibit 1 - J.Wilson & T.Bone Emails to ALJ May 29-June 3 2020 Re Access to Accounts and Records (requiring Cal Advocates' execution of a non-disclosure agreement before providing access to the utility's SAP system).

¹⁷ See SoCalGas Motion to Quash Subpoena, p. 9. See also D.15-08-032, p. 28 (rejecting similar argument).

¹⁸ See SoCalGas Motion to Quash Subpoena, pp. 4, 12, 23-25.

- (13) SoCalGas’ refusal to provide Cal Advocates all versions of the declarations included with its Appeal was unlawful and contrary to the intent of the ALJ Rulings of September 10, 2019, November 2, 2019, and April 6, 2020.
- (14) SoCalGas is subject to sanctions for its violations of the May 5, 2020 Commission Subpoena.
- (15) SoCalGas is subject to sanctions for its refusal to provide Cal Advocates all versions of the declarations included with its Appeal.

B. The Draft Resolution Should Clarify That There Was No Stay in Place While the Commission Considered the SoCalGas Appeal And, As Such, The Utility is Subject To Sanctions For Its Ongoing Refusal To Comply With Discovery Requests, Including The Commission Subpoena

As described in Section I above, the Draft Resolution establishes the precedent that a utility can “appeal” to the Commission any ALJ ruling it contests, and withhold discovery without consequence, unless and until the Commission acts. Absent changes to the Draft Resolution to clarify that a utility must comply with state law, ALJ rulings, and Commission orders pending any appeal, the Commission invites similar ongoing non-compliance with its rules and rulings from other Commission-regulated utilities. In addition to clarifications rejecting such a precedent, the Draft Resolution should also be modified to address the fact that SoCalGas has refused to comply with not only the November 1, 2019 ALJ Ruling, but also the ALJ Ruling issued on September 10, 2019. The following discussion elaborates on the need for these clarifications.

1. The Draft Resolution Should Clearly State That Absent A Stay, SoCalGas Was Obligated to Comply with The ALJ Rulings

It is a fundamental rule that absent a stay, a utility must comply with the existing Commission rule or order. The rules requiring compliance absent a stay, and requiring a showing of “great or irreparable damage” to obtain a stay of a regulatory decision, are critical components of the regulatory scheme that applies to SoCalGas.¹⁹

As affirmed by the United States Supreme Court in its seminal regulatory decision, *Munn v. Illinois*, SoCalGas’ franchise to serve the gas customers in its service territory is contingent on

¹⁹ See, e.g, California Public Utilities Code §§ 1761 et seq.

SoCalGas' submission to Commission regulation.²⁰ This is because, as a franchise holder, the utility's gas business is devoted to the "public interest" and requires regulation to protect that public interest. As the Supreme Court in *Munn* explained, when someone:

devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.²¹

Notwithstanding its fundamental franchise obligation to comply with the Commission's regulatory requirements, SoCalGas picks and chooses the rulings it will follow. Here SoCalGas has repeatedly ignored two ALJ rulings finding its arguments invalid, and refuses to comply with discovery requests to which it objects. Though it cites no supporting rule, decision, or law, SoCalGas effectively asserts that it need not abide by the ALJ's rulings here because it has asked the full Commission to confirm those rulings. Indeed, for almost a year now, SoCalGas has refused to comply with any data request it objects to, including a Commission subpoena to provide access to its SAP system, on claims that it need not comply with these valid requests until the Commission rules on its Appeal.²²

The Draft Resolution should clearly state the utility's obligation to either obtain a stay or comply with ALJ rulings pending subsequent review. Further, if sanctions are not imposed here, the final Resolution should reflect that the Commission intends to order SoCalGas to show cause why it should not be sanctioned for its refusal to comply with ALJ rulings by withholding discovery from Cal Advocates from December 1, 2019 to the present.

2. The Draft Resolution Should Be Modified to Reflect That There Were Two ALJ Rulings Issued Prior To the Appeal and Both Rejected the Arguments SoCalGas Continues to Rely on to Withhold Discovery from Cal Advocates

The Summary section of the Draft Resolution accurately reflects the specific circumstances leading to the SoCalGas Appeal. However, it fails to acknowledge that the ALJ

²⁰ *Munn v. Illinois*, 94 U.S. 113 (1877).

²¹ *Munn v. Illinois*, 94 U.S. 113, 125-132 (1877).

²² See, e.g., SoCalGas May 22, 2020 Motion to Quash.

issued not one, but *two* rulings requiring SoCalGas to comply with earlier discovery requests. Both ALJ rulings – one on September 10, 2019 and the other on November 2, 2019 – rejected nearly identical SoCalGas arguments that the discovery sought by Cal Advocates was not “necessary to perform its duties.”²³ In addition, the November 2, 2020 ALJ ruling rejected SoCalGas’ First Amendment claims initially made in its August 26, 2019 response to the second Cal Advocates’ October 7, 2019 motion to compel. SoCalGas has nonetheless repeatedly continued to raise these same arguments since those rulings were issued in a cynical – but effective – strategy to evade production of discovery.

Because SoCalGas’ refusal to comply with not one, but two ALJ rulings, is an important fact in considering Cal Advocates’ motions for sanctions against SoCalGas, the Summary section of the Draft Resolution should be supplemented to reflect that SoCalGas made the same arguments twice, and its arguments were rejected in both the September 10, 2019 and November 2, 2019 ALJ rulings.

C. The Draft Resolution Should Reject SoCalGas’ Privilege Claims

In response to SoCalGas’ refusal to permit Cal Advocates full access to its SAP accounting system based on privilege claims, the Draft Resolution orders SoCalGas to provide Cal Advocates with a privilege log within 15 days.²⁴ While the Draft Resolution properly recognizes that Cal Advocates is entitled to a privilege log in a somewhat timely manner, this Ordering Paragraph should go significantly further. As the discussion below and Appendix A hereto demonstrates:

- (1) SoCalGas has had every opportunity to provide a privilege log, and has declined to do so;

²³ SoCalGas also argued that Cal Advocates’ discovery authority “is not unfettered” and that Cal Advocates “should not be permitted to circumvent the Commission’s processes and procedures” by engaging in discovery outside of a proceeding, thereby denying SoCalGas’ due process rights. See SoCalGas August 26, 2019 and October 17, 2019 responses to Cal Advocates’ motions to compel, available on the Cal Advocates’ website at <https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4444>.

²⁴ Draft Resolution, Ordering Paragraph 8, p. 34: “Southern California Gas Company shall produce the information and documents requested by Public Advocates Office at the California Public Utilities Commission, including all confidential information not otherwise privileged as attorney-client or attorney work product, in DR No. CalAdvocates-SC-SCG-2019-05 and the May 5, 2020 Commission subpoena, with any related privilege log, within 15 days of the effective date of this Resolution.”

- (2) There is no reason to believe that there is any privileged information in SoCalGas' SAP system;
- (3) The Commission should actively discourage utilities from putting privileged information in their accounting systems;
- (4) SoCalGas has such a recent and well-documented history of intentionally abusing privilege claims and violating court orders to withhold discovery that there is no reason to believe that SoCalGas will behave any differently here; and
- (5) The Commission needs to proactively challenge SoCalGas' privilege assertions to ensure that all Commission staff receive the data they need to perform their jobs.

1. SoCalGas' Claims That Its SAP System Contains Privileged Information Must Be Carefully Scrutinized Because They Are Unsupported and Frustrate Regulatory Objectives

As the Draft Resolution correctly recognizes, § 314(a) of the California Public Utilities Code ensures that the Commission and all of its employees can “*at any time*, inspect the accounts, books, papers, and documents of any public utility.”²⁵ However, in a tactic that successfully frustrated the intent of the May 5, 2020 Commission Subpoena to immediately provide Cal Advocates “access to all databases associated in any manner with the company’s accounting system,” SoCalGas asserted that its “accounting database contains, among other things, documents and information protected from disclosure under the attorney-client privilege, the attorney work-product doctrine, and the First Amendment.”²⁶ Consequently, the utility purported to implement a “custom software solution” to prevent Cal Advocates from accessing *any* attorney billing records for approximately 160 law firms.²⁷

SoCalGas' unilateral deployment of its “custom software solution” has no precedent, is unlawful, and if allowed to stand will undermine the Commission’s well-established authority to review all aspects of a utility’s accounts. Such records are critical to the Commission’s review in

²⁵ Draft Resolution, p. 11.

²⁶ SoCalGas May 22, 2020 Motion to Quash, p. 2. These claims were reiterated in emails to the ALJ from SoCalGas counsel. See, e.g., Exhibit 1 - J.Wilson & T.Bone Emails to ALJ May 29-June 3 2020 Re Access to Accounts and Records.

²⁷ See Exhibit 2 - SoCalGas Response to CalAdvocates-TB-SCG-2020-04 Q 3 re law firms (reflecting that SoCalGas blocked review of all accounting records related to approximately 160 law firms).

rate cases to determine whether the costs incurred were appropriate. They are similarly critical to Cal Advocates' investigation here. Consequently, SoCalGas' overbroad effort to wall off all access to all accounting records related to approximately 160 law firms must be rejected.

Notably – notwithstanding significant follow up by Cal Advocates regarding SoCalGas' claims that its SAP system contains privileged attorney/client or work product communications²⁸ – the evidence suggests that SoCalGas' SAP system does not contain *any* confidential information, and that its privilege claims are nothing more than another smokescreen to delay Cal Advocates' access to its accounts.²⁹

The only support SoCalGas has provided for its privilege claims are bald statements in its pleadings,³⁰ and two declarations from non-attorney staff describing SoCalGas' SAP system.³¹ Significantly, only one of those declarations even addresses the issue of privileged information, explaining with circular reasoning that the SAP system “allows access to information *that SoCalGas maintains should be excluded from Cal Advocates' view as a matter of law*, including certain privileged and other protected information.”³²

Declarations of the type provided by SoCalGas – from a “Financial Systems and Client Support Manager” and an “IT Software Development Manager” – which only describe the SAP system and do not specifically identify any privileged information or even positively assert that such information is contained in SoCalGas' SAP system – are wholly insufficient to establish a claim of privilege.³³ Specifically, the declarations are facially deficient because they do not even assert that privileged information exists in SoCalGas' SAP system. They only state that SoCalGas has asserted the information is privileged. In addition, the facts that *are* provided in the declaration do not provide even a scintilla of the information needed for other parties, such as the Commission, or Cal Advocates, to evaluate the merits of the privilege claim. Lastly, there is

²⁸ These efforts are documented in Attachment A hereto.

²⁹ See Attachment A hereto.

³⁰ See, e.g., SoCalGas May 22, 2020 Motion to Quash, p. 2.

³¹ See SoCalGas May 22, 2020 Motion to Quash, Declarations of Dennis Enrique and Kelly Contratto, available at Exhibits D and E to Attachment A hereto.

³² SoCalGas May 22, 2020 Motion to Quash, Declaration of Kelly Contratto, ¶ 4, available as Exhibit E to Attachment A hereto (emphasis added).

³³ See SoCalGas May 22, 2020 Motion to Quash, Declarations of Dennis Enrique and Kelly Contratto, available at Exhibits D and E to Attachment A hereto.

no reason to believe that the declarants have the expertise to determine whether a document is privileged under the law.

Thus, while Cal Advocates acknowledges that it is not entitled to access the utility's privileged information, SoCalGas has not shown that such privileged information even exists in its SAP system, and both the evidence (or lack thereof) and SoCalGas' past litigation practices suggest that SoCalGas' claims have no basis. In sum, SoCalGas' facially deficient declarations, and its refusal – over seven months – to provide any real evidence in support of its privilege claims, is itself evidence that there is no privileged information in the utility's SAP system.

Given the statutory rule – and fundamental regulatory principle – that the Commission and its employees may access a utility's accounts *at any time*, and that third party auditors also routinely access utility accounts, Cal Advocates suggests that the proper assumption both here, and going forward, is that a utility's accounts do *not* contain privileged information, and that if such information is contained in its accounts, any privilege has been waived due to the high level of transparency required for such accounts. Under this scheme, a utility is obliged to ensure that its outside counsel billing records do not contain privileged information, and that if they must, the utility is obliged to maintain a running log of the location and nature of such information. Permitting utilities to merely assert that their law firm accounts contain privileged information which must be completely walled off from regulators before providing access to their accounting systems opens the door to the very type of discovery abuses SoCalGas has been shown to routinely pursue.

Cal Advocates' position is not only consistent with the utility obligation to make its accounts available *at any time*, and the regulatory need for transparency of a utility's accounts, it is also consistent with the fact that attorneys routinely submit their billing records for third party review, and that any law firm working for a utility should understand that its billing records will, similarly be subject to regulatory review. Consider, for example, that the Commission reviews attorney billing records to determine whether or not to award intervenor compensation. Similarly, courts routinely review attorney billing records to determine if statutory attorney fees are appropriate. Indeed, information regarding PG&E's legal costs related to its bankruptcy is –

properly – publicly available for review and debate.³⁴ In all of these situations, someone has to adjudicate the reasonableness of costs. Such transparency is required in the regulated utility environment, and must be provided by the utility over claims of privilege to delay or frustrate regulatory objectives.

For these reasons, and those set forth below, Cal Advocates proposes that the Commission order SoCalGas to remove its “custom software solution” from its SAP system and provide immediate access to the utility’s accounts consistent with the May 5, 2020 Commission Subpoena.

2. The Commission Should Take Official Notice of The Los Angeles Superior Court’s Extensive Documentation of SoCalGas’ Discovery Abuses in The Aliso Canyon Civil Litigation

In considering how to address SoCalGas’ privilege claims here, the Commission should take official notice of the fact that the Los Angeles Superior Court overseeing the Aliso Canyon plaintiffs’ litigation has documented significant discovery abuses by SoCalGas, almost all of them related to unsubstantiated privilege claims.³⁵ Specifically, a February 20, 2020 Minute Order from that court found that “[b]ased on the prior history of this case, [SoCalGas’] initial claims of privilege are unsupportable and/or are withdrawn an average of 94 percent of the time.”³⁶ The Court observed: “... [SoCalGas], through their counsel, stonewalled over an extended period of this litigation by misusing claims of privilege to attempt to throw Plaintiffs’ counsel off the track with respect to documents to which they were entitled. As a result, Plaintiffs’ counsel were delayed in obtaining documents at a time when they could have been used in deposing Defendants’ current and former employees.”³⁷

³⁴ See Exhibit 3 - \$140 million and counting – Legal bills scrutinized in PG&E bankruptcy, J.D. Morris, *San Francisco Chronicle*, October 3, 2019.

³⁵ See *Gandsey v. Southern California Gas Company*, Superior Court of California, Los Angeles County, Civil Division, Central District, JCCP4861, Southern California Leak Cases (“*Gandsey*”). Cal Advocates proposes that, at a minimum, the Commission take notice of the February 20, 2020 and August 3, 2020 Minute Orders in this case, which are available on the Cal Advocates’ website at <https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4446> under “Additional Items of Interest.”

³⁶ *Gandsey* February 20, 2020 Minute Order, pp. 2-3.

³⁷ *Gandsey* February 20, 2020 Minute Order, p. 18.

The Court found that SoCalGas’ “(1) abusive misconduct in discovery; (2) repeated, unmeritorious objections to discovery by assertion of unsubstantiated claims of privilege; (3) repeated failure to provide opposing counsel and the court with legally required information to permit opposing counsel and the court to evaluate Defendants’ claims of privilege; and (4) willful violation of court orders addressing these issues, when taken together, warrant sanctions”³⁸ The Court observed: “In many ways, what is most upsetting about the litigation tactics of Defendants is that they have only asserted good faith objections when threatened with sanctions or when this court required trial counsel to declare under penalty of perjury that there was a good faith basis for the privilege claims asserted.”³⁹

The Court rejected SoCalGas’ claims that the conduct was unintentional: “The sheer number of privilege assertions that ultimately were unsupportable is evidence that [SoCalGas’] conduct is the result of a concerted policy, and not the hapless mistakes of a few document review attorneys.”⁴⁰

Unfortunately, the Court’s succinct language and significant sanctions have had little impact on SoCalGas or its attorneys. Since the February 20, 2020 Minute Order, the Court has found numerous privilege logs submitted by SoCalGas to be “unreliable” and has required SoCalGas to re-serve those logs, under threat of a \$50,000 per day sanction “imposed jointly and severally against Defendants and their counsel” for failure to do so.⁴¹ An August 3, 2020 minute order from the Court further documents SoCalGas’ and its attorneys’ long history of discovery abuses:

In what was to become a pattern in this case, SoCalGas simply “fail[ed] to provide evidentiary support sufficient to allow the court to find that SoCalGas ha[d] met its burden of establishing privilege by demonstrating that the documents fall within the categories earlier defined by Judge Wiley.”⁴²

³⁸ *Gandsey* February 20, 2020 Minute Order, p. 10.

³⁹ *Gandsey* February 20, 2020 Minute Order, pp. 12-13 (emphases added).

⁴⁰ *Gandsey* February 20, 2020 Minute Order, p. 20.

⁴¹ *Gandsey* August 3, 2020 Minute Order, p. 3, available on the Cal Advocates’ website at <https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4446> under “Additional Items of Interest.”

⁴² *Gandsey* August 3, 2020 Minute Order, pp. 4-5.

The August 3, 2020 Minute Order explains that the Court has found that SoCalGas’ “over-designation” of documents as privileged was intended to delay plaintiffs’ discovery rights and has only been constrained by “extraordinary efforts” by those plaintiffs.⁴³ The Court found that Defendants’ misconduct was both willful and in violation of prior court orders.⁴⁴ It cited to a March 20, 2020 Minute Order which found that there were “clear misstatements of fact” in SoCalGas’ February 2020 Privilege Logs and that SoCalGas’ “counsel [did] not acknowledge and apologize for the misrepresentations, [did] not state they [were] concerned about how or why the misrepresentations were made, [did] not attempt to explain how or why the misrepresentations happened and [did] not describe what steps [were] being taken to ensure there [were] no other misrepresentations and to correct any that [were] found.”⁴⁵

The August 2, 2020 Minute Order explained that the “clear misrepresentations in the February 2020 Logs were of grave concern to the court: ‘It follows [from California law] that when a party through counsel provides an untrue description of a document in a privilege log, the party and its counsel make a misrepresentation not only to opposing counsel, but also to the court. A court cannot take that dissembling lightly.’”⁴⁶

The Commission should take official notice of the Los Angeles Superior Court’s findings regarding SoCalGas’ litigation tactics in the *Gandsey* case because those findings are instructive here. The evidence established in Cal Advocates motions and exhibits starting August 14, 2019 demonstrate that SoCalGas has been using similar tactics to undermine the investigation at issue here. As such, the Commission need not engage in the extended learning process described in the *Gandsey* minute orders. Rather, the Commission should take swift and decisive action to ensure compliance from the utility going forward.

As described in Section II.C above, Cal Advocates’ was entitled to a privilege log months ago, when SoCalGas made its privilege claims, and its decision not to provide that log is evidence that its privilege claims have no basis. As such, the Commission should find that the utility’s opportunity to correct that failing has passed and grant Cal Advocates immediate access

⁴³ *Gandsey* August 3, 2020 Minute Order, p. 9.

⁴⁴ *Gandsey* August 3, 2020 Minute Order, p. 9.

⁴⁵ *Gandsey* August 3, 2020 Minute Order, pp. 11-12, quoting March 20, 2020 Minute Order, pp. 3-4.

⁴⁶ August 3, 2020 Minute Order, pp. 11-12 Quoting March 20, 2020 Minute Order at 3-4.

to the utility’s SAP system. However, to the extent that SoCalGas does provide a privilege log – whether by Commission order or choice – the *Gandsey* Court rulings show that the utility cannot be trusted to make privilege claims with a good faith basis in the law. Consequently, the Draft Resolution should be modified to: (1) Identify a process that the Commission will use to evaluate any SoCalGas’ privilege claims; and (2) require SoCalGas to provide with any privilege log or other documentation asserting privilege, a declaration under penalty of perjury from a SoCalGas attorney that the attorney has reviewed the materials associated with the privilege claims and that such claims have a good faith basis in the law.⁴⁷

Any other outcome will permit SoCalGas to be the own arbiter of whether its privilege claims are justified – which the Los Angeles Superior Court’s experience demonstrates is unworkable.

3. Cal Advocates’ Proposal to Address Privilege Claims

For all of the reasons set forth above, the Draft Resolution should be supplemented to reflect that:

- (1) SoCalGas has provided no meaningful evidence in support of its claims that its SAP system contains privileged information.
- (2) SoCalGas had an obligation to provide a privilege log to the Commission and its offices and divisions whenever it asserts a claim of privilege.⁴⁸
- (3) Any privilege log must contain sufficient information for a party to evaluate the merits of the privilege claim.⁴⁹
- (4) SoCalGas had an obligation under Public Utilities Code § 581 to provide a privilege log to Cal Advocates.
- (5) SoCalGas had an obligation under Public Utilities Code § 581 to provide the declarations requested by Cal Advocates to support the utility’s privilege claims.

⁴⁷ As the Court cogently observed: “when asked to file a declaration as to the good-faith basis of their claims, Defendants chose to abandon over 90 percent of those claims.” *Gandsey* August 3, 2020 Minute Order, pp. 5-6 (emphasis added and citations to an August 14, 2019 Minute Order omitted).

⁴⁸ See, e.g., California Code of Civil Procedure § 2031.240(c)(1) (“If an objection is based on a claim of privilege or a claim that the information sought is protected work product, the response shall provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log.”).

⁴⁹ *Id.*

- (6) A declaration from an employee with no legal training to identify privileged information is not sufficient to establish a claim of privilege.
- (7) The Commission takes official notice of the Los Angeles County Superior Court’s February 20, 2020 and August 3, 2020 Minute Rulings in the Aliso Canyon civil litigation reflecting that SoCalGas has engaged in a pattern and practice of discovery abuses with regard to unjustified claims of privilege.
- (8) SoCalGas’ failure to respond to Cal Advocate’s repeated requests to provide a log of privileged information contained in its accounts is evidence that its privilege claims have not been made in good faith;⁵⁰
- (9) SoCalGas’ failure to comply with Cal Advocates’ requests that it provide a declaration under penalty of perjury from a SoCalGas attorney that the attorney has reviewed the materials associated with the privilege claims and that such claims have a good faith basis in the law is further evidence that SoCalGas’ privilege claims have not been made in good faith;⁵¹
- (10) The law requires that the Commission and its employees have access to SoCalGas’ accounts “at any time”;
- (11) It is unlawful for SoCalGas to demand that the Commission or any of its employees execute a non-disclosure agreement in order review or access information that the utility claims is confidential.⁵²
- (12) This Resolution rejects SoCalGas’ claims that it may withhold information from the Commission or Cal Advocates pursuant to its First Amendment claims.
- (13) Based on the lack of any evidence submitted, this Resolution rejects SoCalGas claims that its SAP system contains any privileged information.
- (14) Within five business days of the effective date of this Resolution, SoCalGas shall provide a declaration under penalty of perjury from both its officer in charge of Information Technology and its General Counsel that all aspects of the “custom software solution” have been removed from its accounts, and that Cal Advocates will have unfettered access to those accounts.

⁵⁰ See Attachment A hereto.

⁵¹ See Attachment A hereto. As described above, the Los Angeles Superior Court in the Aliso Canyon civil litigation has required a similar declaration from SoCalGas attorneys given the company’s significant number of unjustified privilege claims. See *Gandsey* August 3, 2020 Minute Order, pp. 5-6.

⁵² SoCalGas has withheld access to its SAP system on this basis. See Exhibit 1 - J.Wilson & T.Bone Emails to ALJ May 29-June 3 2020 Re Access to Accounts and Records.

(15) If the Commission determines that SoCalGas is required to provide a privilege log, given the utility’s refusal to provide such a log for approximately seven months, and to discourage the type of over-designation experienced in the *Gandsey* case, the Commission should require that the following documentation be provided to the service list for this investigation within five business days of the effective date of this Resolution:

- a. A privilege log consistent with the format set forth in Cal Advocates’ Data Request TB-SCG-2020-05 Question 2,⁵³ including information specific enough for Cal Advocates to identify where the document can be found in the SAP system;
- b. A declaration under penalty of perjury from SoCalGas’ General Counsel that an attorney familiar with the law applicable to First Amendment association and privilege claims has reviewed the items identified as privileged and has confirmed that there is a good faith basis in the law for each of SoCalGas’ privilege claims; and
- c. A declaration consistent with the request set forth in Cal Advocates’ Data Request TB-SCG-2020-05 Question 3.⁵⁴

D. The Draft Resolution Should Clarify That SoCalGas’ First Amendment Rights Are Constrained By Its Status As A Regulated Utility Operating In the Public Interest And Requires Disclosure Of Any Entities The Utility Hires To Advocate Or Educate On Its Behalf

The Draft Resolution properly finds that SoCalGas’ First Amendment claims of association have no basis here.⁵⁵ However, it errs in two ways. First, it goes too far when it finds that “[t]he First Amendment protections apply to private organizations and corporations, such as SoCalGas.”⁵⁶ This Finding 13 suggests that SoCalGas has the same First Amendment rights of association as any other corporation. This is not correct. And while Finding 14 stating that “SoCalGas’ right to associate for political expression is not absolute” appears to temper Finding 13, it is not sufficient. Indeed, all entities’ “right to associate for political expression is

⁵³ This data request is available at Attachment A, Exhibit F.

⁵⁴ See Attachment A, Exhibit F.

⁵⁵ See, e.g., Draft Resolution Findings 16-21.

⁵⁶ Draft Resolution Finding 13, p. 30.

not absolute.” Second, the Draft Resolution errs by failing to address the utility’s claims that such “First Amendment” information may not be made publicly available.

As set forth in nearly any primer on regulatory law and policy,⁵⁷ public utilities are not the same as any other corporation. As explained in Section II.B.1 above, well-settled United States Supreme Court law recognizes that SoCalGas’ business is devoted to the “public interest” and requires regulation to protect that public interest. As such, SoCalGas’ First Amendment rights of association are necessarily more constrained than the rights of other, unregulated, entities. Finding 13 should be modified to reflect this.

Further, based on its status as a regulated utility whose revenues are derived entirely from captive ratepayers, it is appropriate for the Commission to find here that not only has SoCalGas failed to make a valid First Amendment claim, but that there is no First Amendment basis to withhold from the public the identity of any person or entity the utility pays to advocate, “influence” or “educate” on its behalf. Such a finding is necessary given the significant public interest in SoCalGas’ efforts to undermine the state’s climate policies.⁵⁸

Only by recognizing SoCalGas’ obligation to operate in the public interest and making such information publicly available will SoCalGas’ customers, and its legislators, be able to hold the utility accountable for its misinformation campaigns, which it has thus far attempted to pursue in secret. If the utility seeks to “educate” “influence” or otherwise advocate for specific positions, its status as a public utility devoted to the public interest and entirely funded by captured ratepayers requires that such activities be transparent.

E. The Draft Resolution Should Clarify That SoCalGas’ Confidentiality Claims Remain to Be Determined

Cal Advocates observes that there is a standing Public Records Act (PRA) request issued January 30, 2020, for the Commission to make available all of the data responses Cal Advocates

⁵⁷ See, e.g., *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction*, Scott Hempling, American Bar Association, 2013, pp. 41-44; and *Energy Law in a Nut Shell*, Joseph P. Tomain and Richard D. Cudahy, Thomson-West, 2004, pp. 118-120 (citing *Nebbia v. New York*, 291 U.S. 502 (1934) - “public utilities are deemed to be ‘affected with a public interest.’”).

⁵⁸ Evidence of the public interest in SoCalGas’ astroturf activities is demonstrated by the number of press reports on these SoCalGas activities, the letters from state and federal legislators on these issues (see footnote 14 above) and the standing Public Records Act request for all discovery obtained from SoCalGas regarding its astroturf activities. See Section II.E below and press reports on Cal Advocates website at <https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4446>.

has received from SoCalGas as a result of the instant investigation.⁵⁹ While a significant number of SoCalGas data responses to Cal Advocates' discovery have been made public in response to this PRA request,⁶⁰ some of the most relevant data responses remain in limbo because of SoCalGas' numerous confidentiality claims.

Adoption of the Draft Resolution, with the modifications proposed above, could provide some much needed clarity on these issues. Additional clarity is also needed so that the Commission may release a significant portion of the information that is still pending as soon as practicable. With these goals in mind, Cal Advocates proposes that the Findings in the Draft Resolution be supplemented as follows:

- (1) There is an outstanding Public Records Act (PRA) request dated January 30, 2020, for, among other things, all SoCalGas "responses to data requests issued from June 1, 2019 to the present by [Cal Advocates] related to SoCalGas efforts to oppose fuel switching from natural gas to electric ends uses in the building and transportation sectors."
- (2) The Commission and/or Cal Advocates shall make those materials not marked as confidential publicly available pursuant to the PRA as soon as practicable.
- (3) The Commission reserves the right to disclose at any time the materials that it finds should not be protected as confidential consistent with the PRA and other laws and practices regarding confidential materials.⁶¹

⁵⁹ That PRA request is available on Cal Advocates' website at <https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4446> under "Additional Items of Interest."

⁶⁰ The public versions of many of these data requests are available on the Cal Advocates' website at <https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4445>

⁶¹ See, e.g., D.20-03-014, pp. 21-22:

Pub. Util. Code § 583 "neither creates a privilege of nondisclosure for a utility, nor designates any specific types of documents as confidential." (*Re Southern California Edison Company* (1991) 42 CPUC2d 298, 301; *Southern California Edison Company v. Westinghouse Electric Corporation* (1989) 892 F.2d 778, 783 ["On its face, Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities."]; and Decision 06-06-066, [fn. omitted] as modified by Decision 07-05-032 at 27 [583 does not require the Commission to afford confidential treatment to data that does not satisfy substantive requirements for such treatment created by other statutes and rules.] In fact, Pub. Util. Code § 583 vests the Commission with broad discretion to disclose information that a party deems confidential. (D.99-10-027 [fn. omitted] (1999) CA PUC LEXIS 748 at *2 [Pub. Util. Code § 583 gives the Commission broad discretion to order confidential information provided by a utility be made public.].) As such, a party may not rely on Pub. Util. Code § 583 for the proposition that information required by the Commission to be submitted is confidential.

III. CONCLUSION

For the reasons set forth above, Cal Advocates urges the Commission to modify the Draft Resolution as set forth herein, and to sanction SoCalGas for its flagrant violations of state laws and Commission requirements as already fully briefed by the parties in relation to Cal Advocates' June 23, 2020 and July 9, 2020 motions for sanctions.

Respectfully submitted,

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